BLANK PAGE

LANK PAGE

INDEX

	Page
Opinion below	1
Jurisdiction	1
Question presented	2
Statute involved	2
Statement	3
Summary of argument	6
Argument:	
The unfair competitive methods employed by respondent in its intrastate sales, by which it diverted trade from those selling in competition with it in interstate commerce, were "unfair methods of competition in [interstate] commerce" which the Commission was authorized to prohibit	8
Conclusion	22

CITATIONS

Cases:	
American Can Co. v. *Ladoga Canning Co.*, 44 F. (2d) 763, certiorari denied, 282 U. S. 899	7, 18
Apex Hosiery Co. v. *Leader*, 310 U. S. 469	15
Bunte Bros., Inc. v. *Federal Trade Commission*, 104 F. (2d) 996	3
California Rice Industry v. *Federal Trade Commission*, 102 F. (2d) 716	14
Canfield Oil Co. v. *Federal Trade Commission*, 274 Fed. 571	14
Chamber of Commerce of Minneapolis v. *Federal Trade Commission*, 13 F. (2d) 673	13
Coronado Coal Co. v. *United Mine Workers*, 268 U. S. 295	15
Federal Trade Commission v. *Beech-Nut Packing Co.*, 257 U. S. 441	10, 11
Federal Trade Commission v. *Keppel & Bro., Inc.*, 291 U. S. 304	3
Federal Trade Commission v. *Raladam Co.*, 283 U. S. 643	8, 10, 15
Federal Trade Commission v. *Royal Milling Co.*, 288 U. S. 212	15
Federal Trade Commission v. *Sinclair Refining Co.*, 261 U. S. 463	10
Federal Trade Commission v. *Western Meat Co.*, 272 U. S. 554	9
Holy Trinity Church v. *United States*, 143 U. S. 457	12
Houston, East & West Texas Ry. Co. v. *United States*, 234 U. S. 342	7, 16, 17
In the Matter of California Rice Industry, 26 F. T. C. Decs. 968	15
Law Ow Bew v. *United States*, 144 U. S. 47	12
Local 167 v. *United States*, 291 U. S. 293	11
Loewe v. *Lawlor*, 208 U. S. 274	11

275594—40——1

Cases—Continued. Page

National Harness Mfrs.' Association v. *Federal Trade Commission*, 268 Fed. 705 13
Paramount Famous Lasky Corp. v. *United States*, 282 U. S. 30 10
Standard Oil Co. (Indiana) v. *United States*, 283 U. S. 163 11
United Mine Workers v. *Coronado Coal Co.*, 259 U. S. 344 15
United States v. *Katz*, 271 U. S. 354 12
United States v. *Patten*, 226 U. S. 525 11
United States v. *Stewart*, No. 13, this term 21

Statutes:

Bituminous Coal Act, c. 127, 50 Stat. 76 (15 U. S. C. Supp. V, sec. 831 21
Civil Aeronautics Act, c. 601, 52 Stat. 977 (49 U. S. C. Supp. V, sec. 401) 21
Clayton Act, secs. 1, 2, c. 323, 38 Stat. 730 (15 U. S. C., secs. 12, 13) 18
Federal Trade Commission Act, secs. 4, 5, c. 311, 38 Stat. 719, as amended by the Act of March 21, 1938, c. 49, 52 Stat. 111 (15 U. S. C. Supp. V, secs. 44, 45) 2, 3, 19
Interstate Commerce Act, sec. 1, 24 Stat. 379, 34 Stat. 584, 36 Stat. 544 (49 U. S. C., sec. 1(2)) 16
National Labor Relations Act, c. 372, 49 Stat. 450, 453 (29 U. S. C. Supp. V, secs. 152, 159, 160) 21
Robinson Patman Act, c. 592, 49 Stat. 1526 (15 U. S. C. Supp. V, sec. 13 (a)–(f)) 18
Transportation Act of 1920, c. 91, 41 Stat. 484 (49 U. S. C., sec. 13 (4)) 16

Miscellaneous:

79 Cong. Rec. 1843, 1844 20
H. Rept. No. 533, part 3, 63d Cong. 2d Sess., pp. 2, 19–20 10
H. Rept. No. 1142, 63d Cong., 2d Sess., pp. 18–19 10
S. 944, 74th Cong., 1st Sess 19
S. 1077, 75th Cong., 1st Sess 19
S. Rept. No. 46, 74th Cong., 1st Sess., p. 1 20
S. Rept. No. 221, 75th Cong., 1st Sess., p. 1 19
Stevens, William S., *Unfair Competition*, 29 Political Science Quarterly 282, 282–284 10

In the Supreme Court of the United States

OCTOBER TERM, 1940

No. 85

FEDERAL TRADE COMMISSION, PETITIONER

v.

BUNTE BROTHERS, INC.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE FEDERAL TRADE COMMISSION

OPINION BELOW

The opinion of the Circuit Court of Appeals (R. 321) is reported in 110 F. (2d) 412.

JURISDICTION

The judgment of the Circuit Court of Appeals was entered on February 20, 1940 (R. 327). Petition for a writ of certiorari was filed May 20, 1940, and was granted October 14, 1940. The jurisdiction of this Court rests on section 5 of the Federal Trade Commission Act (15 U. S. C., sec. 45) and on section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925.

QUESTION PRESENTED

Whether the competition between companies selling in interstate commerce and a company selling in intrastate commerce is "competition in [interstate] commerce" and whether the unfair methods used in such competition by the intrastate seller are "unfair methods of competition in [interstate] commerce", within the meaning of the Federal Trade Commission Act.

STATUTE INVOLVED

The pertinent provisions of the Federal Trade Commission Act, c. 311, 38 Stat. 719, as amended by the Act of March 21, 1938, c. 49, 52 Stat. 111 (15 U. S. C., Supp. V, secs. 44, 45) are as follows:

> SEC. 4. The words defined in this section shall have the following meaning when found in this Act, to wit:
>
> "Commerce" means commerce among the several States or with foreign nations, or in any Territory of the United States or in the District of Columbia, or between any such Territory and another, or between any such Territory and any State or foreign nation, or between the District of Columbia and any State or Territory or foreign nation.
>
> * * * * *

---

[1] The Commission instituted the present proceeding before, but concluded it after, the passage of the amendatory Act of March 21, 1938. The amendments are not pertinent to the questions in issue in this case, but it may be noted that the words "and unfair and deceptive acts or practices in commerce" in each of the first two paragraphs of section 5 were added by the Act of March 21, 1938.

SEC. 5. (a) Unfair methods of competition in commerce, and unfair or deceptive acts or practices in commerce, are hereby declared unlawful.

The Commission is hereby empowered and directed to prevent persons, partnerships, or corporations * * * from using unfair methods of competition in commerce and unfair or deceptive acts or practices in commerce.

STATEMENT

Respondent is a candy manufacturer engaged in selling its product both in Illinois, where its principal office and place of business are located, and in other states (R. 8). The Commission, prior to the order which it issued in the present case, had issued an order against respondent in another proceeding directing it to cease from selling candy in interstate commerce so packed and arranged that the amount received by the ultimate purchaser was dependent upon chance. The practices against which this order was directed were indistinguishable from those found to be unfair methods of competition in *Federal Trade Commission* v. *Keppel & Bro., Inc.*, 291 U. S. 304, and the order was affirmed on review. *Bunte Bros., Inc.* v. *Federal Trade Commission*, 104 F. (2d) 996 (C. C. A. 7).

The present proceeding involves the validity of respondent's use of the same unfair methods of competition in sales to Illinois purchasers. The Commission concluded that these were unfair methods of competition in interstate commerce within the meaning of section 5 of the Trade Commission Act and it entered an order requiring respondent to desist therefrom in its sales in the state of Illinois (R. 14–15). The Commis-

sion's conclusion and order were based on the following findings of fact, among others:

Candies so packed as to involve the element of chance in their sale, which are referred to as chance assortments, are in direct competition with candies packed for sale at a stated price per unit, which are known as "straight goods" (R. 11). Many retail dealers prefer to buy all of their candy from one jobber and, consequently, such retail dealers, if they desire chance assortments, purchase all of their candy from a jobber who handles, in addition to straight goods, chance assortments as well (*ib.*).

A salesman for a candy manufacturer who can offer chance assortments of candy "has a tremendous advantage in soliciting business from jobbers" over one who does not have such chance assortments to offer (*ib.*). The representatives of 48 candy manufacturers whose plants were located in states other than Illinois and who shipped annually into Illinois over $1,440,000 of straight candies found that their failure to carry chance assortments was a decided handicap in securing business in Illinois (*ib.*).

At the close of the taking of testimony in this proceeding 127 competitors of respondent had outstanding against them orders which required them to cease and desist from selling chance assortments of candy in interstate commerce (R. 8–9).[2] One Wisconsin candy man-

[2] The Commission's orders of this kind have been consistently affirmed. The Government's petition for writ of certiorari in the present case gave citations (p. 4) to decisions of affirmance in 31 cases. In four of the cited decisions certiorari was denied.

ufacturer against whom the Commission had issued such a cease and desist order suffered an 80% decline in his Illinois sales during the four months' period following issuance of this order (R. 12). Another Wisconsin candy manufacturer, against whom such an order had been issued, lost 20% of his Illinois business (*ib.*). Their loss of business was "due directly to the presence of break and take candy in the Illinois candy market" (*ib.*).

Respondent's chance assortments are distributed to 95% of the candy jobbers in Illinois and its Illinois sales of one type of chance assortment rose from 40,000 units in 1935 to 86,000 units in 1936, an increase of 115% (R. 10). The dollar volume of its sales in Illinois rose from $275,400 in 1935 to $314,400 in 1936, of which chance assortments constituted 23% (*ib.*). Respondent's sale of chance assortments in Illinois "has a direct and powerful burdensome effect" upon the shipment of candy into Illinois from other states and "gives respondent an undue and unreasonable preference over competitors located in other states" (R. 13).

The court below did not question the validity of any of the Commission's findings of fact. It also agreed with the Commission that respondent's methods of competition were "unfair" (R. 323). The court likewise did not question the constitutionality of the Commission's exercise of authority provided adequate statutory basis therefor existed (see R. 325, 327). The court nevertheless set aside the Commission's order upon the ground that unfair methods in the promotion

of intrastate sales are not unfair methods of competition "in" interstate commerce within the purview of the Federal Trade Commission Act even though such methods are used in competition with those engaged in interstate commerce and directly divert trade from interstate competitors. The court conceded, however, that "the disposition of this close and troublesome question" was "not free from doubt" (R. 325, 327).

SUMMARY OF ARGUMENT

The Federal Trade Commission Act prohibits "unfair methods of competition in [interstate] commerce". In determining the scope of the words "competition in commerce", the commerce of the party injured by the unfair methods of competition is just as important as the commerce of the party using the unfair methods. Competition between goods sold in interstate commerce and goods sold intrastate is competition "in" interstate commerce and unfair methods used in such competition by the intrastate seller are unfair methods of competition in such commerce.

This construction of the act serves to effectuate its purpose. It, like the Sherman Act, was enacted in order to maintain freedom of competition in interstate commerce. If this purpose is to be effectively achieved the act should apply whenever interstate commerce is subjected to the kind of injury which the statute was intended to prevent, irrespective of whether the acts or conduct causing the injury are themselves interstate or not. This has been the construction given the Sherman Act. It applies where interstate competition or inter-

state trade is unduly restrained by conduct outside the field of interstate commerce and the "supplementary" Federal Trade Commission Act should be given an equally broad application.

Unless the Trade Commission Act protects interstate commerce against injury from the unfair methods of competition used by an intrastate seller, the statute, enacted by Congress in the exercise of its commerce power, will or may operate to discriminate against interstate commerce in favor of intrastate commerce. The record in the present case shows that this very situation has arisen in the candy trade. A construction of a statute producing unreasonable consequences should be rejected if its language permits another interpretation consistent with the legislative purpose.

Certain decisions by the lower federal courts have recognized that an unfair trade method which adversely affects interstate competitors necessarily is, because of this effect, an unfair method of "competition in [interstate] commerce." In addition, the interpretation of the statute urged by the Government is supported by the construction which has been placed upon statutory provisions closely analogous to those here involved. *Houston, East & West Texas Ry. Co.* v. *United States,* 234 U. S. 342, 358–359; *American Can Co.* v. *Ladoga Canning Co.,* 44 F. (2d) 763, 770 (C. C. A. 7), certiorari denied, 282 U. S. 899.

273594—40——2

ARGUMENT

THE UNFAIR COMPETITIVE METHODS EMPLOYED BY RESPONDENT IN ITS INTRASTATE SALES, BY WHICH IT DIVERTED TRADE FROM THOSE SELLING IN COMPETITION WITH IT IN INTERSTATE COMMERCE, WERE "UNFAIR METHODS OF COMPETITION IN [INTERSTATE] COMMERCE" WHICH THE COMMISSION WAS AUTHORIZED TO PROHIBIT

The Federal Trade Commission Act makes unlawful "unfair methods of competition in commerce" and the word "commerce" is defined in the act as meaning interstate commerce.[3] The question which is at issue here is the meaning of the words "competition in commerce."

1. Competition necessarily involves rivalry and always is a two-sided affair. Unfair competition is likewise necessarily two-sided: on one side there must be a party engaging in unfair trade methods and on the other side there must be a competitor injured by these unfair methods. There can therefore never be unfair methods of "competition" within the meaning of the Federal Trade Commission Act unless both conditions are present and the Commission is without authority to proceed if only the unfair trade practice, without the corelative injury to a competitor, is established. *Federal Trade Commission* v. *Raladam Co.*, 283 U. S. 643, 649.

The construction of the statute adopted by the court below gives consideration to only one of the adversaries

---

[3] See section 4, *supra*, p. 2. The definition also includes foreign commerce and commerce in the District of Columbia and territories of the United States, but all that is important for the purposes of the present case is that "commerce" means interstate as distinguished from intrastate commerce.

involved in unfair methods of competition since the court construed the phrase "competition in commerce" solely with reference to the commerce of the party employing the unfair methods of competition. This construction led the court to conclude that the Commission is without jurisdiction if the party using unfair methods of competition employs them solely in promoting his intrastate sales.

The Government contends that the commerce of those injuriously affected by unfair methods of competition must also be considered in determining the application of the phrase "competition in commerce". It submits that the competition between goods sold in interstate commerce and those sold intrastate is competition "in" interstate commerce and that when unfair competitive methods are employed in such competition by one who sells intrastate, these are "unfair methods of competition in [interstate] commerce" within the meaning of the act.

The interpretation of the act urged by the Government, namely, that in determining its application the commerce of the victim is as important as that of the culprit, serves to carry out the recognized objectives of the statute. It is, of course, well settled that where the words of a statute are open to more than one interpretation the courts adopt the one which will best effectuate the statutory objectives and the intention of the lawmakers. The words of the statute "must be read in the light of its general purpose and applied with a view to effectuate such purpose". *Federal Trade Commission* v. *Western Meat Co.*, 272 U. S. 554, 559.

2. "Section 5 of the Trade Commission Act is supplementary to the Sherman Anti-Trust Act". *Federal Trade Commission* v. *Raladam Co., supra,* p. 647. It was passed to stop in their incipiency practices which tend to promote monopoly or to destroy the freedom of the market.[4] The "great purpose" of the act "was to advance the public interest by securing fair opportunity for the play of the contending forces ordinarily engendered by an honest desire for gain". *Federal Trade Commission* v. *Sinclair Refining Co.,* 261 U. S. 463, 476. This likewise is the underlying purpose and objective of the Sherman Act. *Paramount Famous Lasky Corp.* v. *United States,* 282 U. S. 30, 42–43.

Since the Trade Commission Act was designed to supplement the prohibitions of the Sherman Act and since the fundamental purpose of the two statutes is the same, the scope and application of the Trade Commission Act is determined in the light of the scope and application of the prohibitions of the Sherman Act. This Court has said that the public policy declared in the Sherman Act is "to be considered in determining what are unfair methods of competition, which the Federal Trade Commission is empowered to condemn and suppress". *Federal Trade Commission* v. *Beech-Nut Packing Co.,* 257 U. S. 441, 453. It has also declared that the Trade Commission Act "undoubtedly was aimed at all the familiar methods of law violation

[4] H. Rept. No. 1142, 63d Cong., 2d Sess., pp. 18–19. See also the practices which were contemporaneously listed as constituting unfair competition (H. Rept. No. 533, part 3, 63d Cong., 2d Sess., pp. 2, 19–20 (minority report); William S. Stevens, *Unfair Competition,* 29 Political Science Quarterly 282, 282–284 (1914)).

which prosecutions under the Sherman Act had disclosed". *Federal Trade Commission* v. *Keppel & Bro., Inc.*, 291 U. S. 304, 310.

The purpose of the Sherman Act is to prevent undue suppression of interstate competition by combination or conspiracy and the purpose of the Federal Trade Commission Act is to prevent suppression of such competition by unfair competitive methods. Since the purpose of each statute is to protect interstate commerce against a certain kind of injury, its application is to be determined by the presence or absence of this kind of injury, not by the interstate or intrastate character of the conduct giving rise to the injury or threatened injury to interstate commerce. If either statute is inapplicable where intrastate conduct causes the kind of injury to interstate commerce which the statute was designed to prevent, it fails fully to achieve its purpose.

No such limited construction has been placed upon the Sherman Act. It has always been held to apply to intrastate acts and conduct which unduly restrict competition in interstate commerce or unduly restrain interstate trade.[5] We submit that the provisions of the "supplementary" Federal Trade Commission Act should be given an equally wide application and should be held to protect interstate commerce against injury from unfair methods of competition whether the methods themselves are used in intrastate or in interstate commerce.

---

[5] For decisions prior to enactment of the Trade Commission Act, see *Loewe* v. *Lawlor*, 208 U. S. 274, 301; *United States* v. *Patten*, 226 U. S. 525, 541–542. For later decisions, see *Standard Oil Co.* v. *United States*, 283 U. S. 163, 168–169; *Local 167* v. *United States*, 291 U. S. 293, 297.

3. There is another principle of statutory construction supporting the Government's position. An interpretation of a statute producing absurd or unreasonable consequences will be rejected if its language permits another construction consistent with the legislative purpose.[6] The interpretation of the Trade Commission Act adopted below means that in the competition between interstate sellers and an intrastate seller, the former are barred from competing by unfair methods but the latter is not. Under this interpretation, the act ties the hands of the former but not of the latter. The interstate sellers must submit to the injury caused by the unfair methods of their intrastate competitor and they are not even free to employ the same unfair methods by way of self-defense. The statute, enacted in the exercise of the commerce power of Congress, thus operates or may thus operate not to protect but to discriminate against interstate commerce in favor of intrastate commerce.

The facts of the present case show that this injurious discrimination against interstate commerce is not a mere theoretical contingency. Unless the decision below is reversed, enforcement of the act will bring about this very discrimination in the candy trade. The Commission has issued orders against at least 127 of respondent's competitors barring them from selling chance assortments of candy in interstate commerce (R. 9), but under the decision below respondent and all

---

[6] *Holy Trinity Church* v. *United States*, 143 U. S. 457, 460; *Law Ow Bew* v. *United States*, 144 U. S. 47, 59; *United States* v. *Katz*, 271 U. S. 354, 357.

others selling intrastate may use this same unfair method of competition to increase their business at the expense of those who sell in interstate commerce.

4. Several decisions of the lower federal courts recognize that the power given the Commission to prohibit unfair methods of competition in interstate commerce authorizes it to issue an order against a concern which is not itself engaged in interstate commerce.

In *National Harness Mfrs.' Association* v. *Federal Trade Commission,* 268 Fed. 705 (C. C. A. 6), the Commission had issued an order under section 5 of the Trade Commission Act directing an association composed of local associations of retail dealers to cease from conspiring with others to carry out an unfair system of distribution. The court, relying upon Sherman Act decisions, held (p. 709) that the Commission had authority to issue an order against the association upon two grounds, first, that many of its members were engaged in interstate commerce and, second, "that interstate commerce is claimed to have been *directly affected by* the alleged unfair methods of competition" (italics ours). In *Chamber of Commerce of Minneapolis* v. *Federal Trade Commission,* 13 F. (2d) 673 (C. C. A. 8), the Commission's order, issued under section 5, directed the Chamber of Commerce, which conducted a grain exchange, to abandon certain unfair rules and practices injurious to another grain exchange operating in the same city. The court held (p. 684) that—

> Congress, in the Federal Trade Commission Act, has assumed to legislate concerning "unfair methods of competition" *affecting* interstate commerce and if any action by or any rule or

> regulation of the Chamber has that effect it is certainly subject to that act, * * *. [Italics ours.]

The courts in these cases referred to unfair methods of competition "affecting" interstate commerce. This does not mean that the word "in", as used in the phrase "competition in commerce", was interpreted as the equivalent of the word "affecting". We regard the expression as a short-cut way of saying that whenever unfair trade methods adversely affect competitors selling in interstate commerce, these methods are, by reason of such effect, unfair methods of competition "in" interstate commerce.[7]

Respondent has urged that the decision below is supported by *California Rice Industry* v. *Federal Trade Commission,* 102 F. (2d) 716 (C. C. A. 9). In that case the Commission in a proceeding under section 5 of the Trade Commission Act issued an order requiring an association (organized and controlled by California growers and millers of rice) to cease from fixing prices in interstate commerce and from fixing milling quotas. The court (pp. 722–723) affirmed the former provi-

---

[7] In *Canfield Oil Co.* v. *Federal Trade Commission*, 274 Fed. 571 (C. C. A. 6), where the methods of competition which the Commission found to be unfair were used wholly in intrastate commerce, the Commission urged as a defense that the unfair methods affected the interstate business of competitors and that the Commission therefore had jurisdiction to enter its order. The court (pp. 574–575) rejected this defense, not upon the ground that it would be insufficient under the statute, but upon the ground that, even if the Commission's order had been placed on this ground, the evidence and findings did not furnish the necessary factual foundation therefor.

sions of the order but set aside the latter. It held that the fact that the fixing of milling quotas affects the volume of rice entering interstate commerce does not make this practice a method of competition "in" interstate commerce, and ruled that the act did not proscribe unfair practices "affecting" interstate commerce. But in that case the Commission's sole relevant finding was that milling quotas had been fixed. It did not find that production had been limited with the effect of or for the purpose of suppressing interstate competition or fixing prices in interstate markets.[8] Since the bare finding that output was restricted is insufficient to show that interstate competition or interstate competitors were injuriously affected,[9] the decision is entirely consistent with the interpretation of the Federal Trade Commission Act here urged by the Government.

Respondent has also relied upon statements made in *Federal Trade Commission* v. *Royal Milling Co.*, 288 U. S. 212, 216, and in *Federal Trade Commission* v. *Raladam Co.*, 283 U. S. 643, 646, where this Court, in setting forth the requisites for a valid order of the Commission, said that the unfair methods complained of must be "methods of competition in commerce".

[8] For the findings of the Commission, see *In The Matter of California Rice Industry*, 26 F. T. C. Decs. 968, 976–981.

[9] In cases under the Sherman Act the mere showing of a combination to stop or limit production is insufficient to establish a combination in restraint of interstate commerce. See *United Mine Workers* v. *Coronado Coal Co.*, 259 U. S. 344; *Coronado Coal Co.* v. *United Mine Workers*, 268 U. S. 295, 310; *Apex Hosiery Co.* v. *Leader*, 310 U. S. 469, 501–504, 512–513.

Clearly these statements do not even inferentially support respondent's construction of the act. Not only was there no question raised in these cases as to whether the unfair methods of competition were or were not "in" interstate commerce, but the quoted language merely repeats the words of the statute.

5. *Houston, East & West Texas Ry. Co.* v. *United States,* 234 U. S. 342, presented a question of statutory construction closely analogous to the question at issue in the present case. The question there was whether the Interstate Commerce Act authorized the Interstate Commerce Commission to regulate intrastate rates which discriminated against interstate commerce.[10] Section 3 of the act made it unlawful for any carrier to subject any shipper or description of traffic to any undue or unreasonable prejudice or disadvantage. Section 1 declared that the act applies only to transportation which is interstate or foreign; this limitation on the act's application was reaffirmed in the following proviso:

> *Provided, however,* That the provisions of this Act shall not apply to the transportation of passengers or property * * * wholly within one State and not shipped to or from a foreign country from or to any State or Territory as aforesaid * * *.[11]

---

[10] The case arose in 1911 before this authority was expressly conferred upon the Commission by the Transportation Act of 1920, c. 91, 41 Stat. 484 (49 U. S. C., sec. 13 (4)).

[11] Sec. 1 of the Act of February 4, 1887, 24 Stat. 379 (49 U. S. C., sec. 1 (2)). The quoted language was reenacted without change by the Acts of June 29, 1906 (34 Stat. 584), and June 18, 1910 (36 Stat. 544).

This Court (p. 358) construed the above proviso as limited to "exclusively intrastate traffic, separately considered; to the regulation of domestic commerce, as such" and as therefore inapplicable to a discrimination against interstate trade arising "from the relation of intrastate to interstate rates." The Court said (pp. 358–359):

> Such a matter is one with which Congress alone is competent to deal, and, in view of the aim of the act and the comprehensive terms of the provisions against unjust discrimination, there is no ground for holding that the authority of Congress was unexercised and that the subject was thus left without governmental regulation.

The same considerations of policy and constitutional power apply in the present case, and also the same consideration of statutory purpose. The Interstate Commerce Act was designed to keep interstate transportation free from discriminatory rates and the Federal Trade Commission Act is designed to keep interstate commerce free from unfair methods of competition. The prohibitions of the two statutes are stated in equally broad terms—in the former the prohibition is stated as applicable to interstate transportation and in the latter it is stated as applicable to competition in interstate commerce. Intrastate transportation producing the kind of injury to interstate commerce which the Interstate Commerce Act was designed to protect against fell within the regulatory provisions of that act, notwithstanding an express exemption of transportation "wholly within one State." *A fortiori,* under the Federal Trade Commission Act, which contains no such

express exemption, intrastate conduct resulting in the injury to interstate competition which the act is designed to protect against should be held to be within its provisions.

American Can Co. v. *Ladoga Canning Co.*, 44 F. (2d) 763 (C. C. A. 7), certiorari denied, 282 U. S. 899, is closely analogous to the issue here. It was a suit to recover triple damages for injury alleged to have been caused by defendant's violation of section 2 of the Clayton Act. At that time section 2 provided: [12]

> It shall be unlawful for any person engaged in commerce,[13] *in the course of such commerce,* either directly or indirectly to discriminate in price between different purchasers of commodities * * * where the effect of such discrimination may be to substantially lessen competition or tend to create a monopoly in any line of commerce * * *.

The evidence showed that the defendant sold cans to a competitor of the plaintiff at prices substantially lower than those which it charged the plaintiff. It also showed that 99% of defendant's sales to this competitor were intrastate. Although the phrase "in the course of *such* commerce" seems clearly to refer to the commerce of the discriminator, the court held that it likewise refers to the commerce of the party receiving the benefit of the discriminatory price and that the statute is

---

[12] Sec. 2 of the Act of October 15, 1914, c. 323, 38 Stat. 730 (15 U. S. C., sec. 13). Section 2 was later radically amended by the Act of June 19, 1936, known as the Robinson-Patman Act, c. 592, 49 Stat. 1526 (15 U. S. C., Supp. V, sec. 13 (a)–(f)).

[13] Section 1 provides that the word "commerce," as used in the Act, means interstate or foreign commerce.

violated if the commerce of the *latter* is interstate. The court said (p. 770):

> Bearing in mind that the restraint through discriminations which is condemned by the aforementioned section 2 is upon "the freedom of competition in the channels of interstate trade which it has been the purpose of all the anti-trust acts to maintain," it is apparent that "in the *course* of such commerce" cannot be narrowly restricted to sales made by the discriminator, but includes the commerce of the purchaser receiving the price discrimination.

6. Respondent has contended that its interpretation of the Federal Trade Commission Act is supported by certain action taken by Congress with respect to amendment of the act. By the Act of March 21, 1938 (52 Stat. 111), Congress made various procedural changes in the act and also amended the first paragraph of section 5 so as to extend its prohibition to "unfair or deceptive acts or practices in commerce".[14] Three years earlier the Senate, while considering bills on the calendar to which there was no objection, passed a bill (S. 944) which amended the first paragraph of section 5 so as to make it prohibit unfair methods of competition "in or affecting commerce" and unfair or deceptive acts or practices "in or affecting commerce".[15] The words "in

---

[14] The bill (S. 1077) which became the Act of March 21, 1938, was identical with a bill which the Senate had passed during the Seventy-fourth Congress (S. Rept. No. 221, 75th Cong., 1st Sess., p. 1).

[15] The bill made a corresponding change in the second paragraph of section 5, but did not otherwise amend the Trade Commission Act.

or affecting commerce" were used instead of "in commerce" in order "expressly" to extend the Commission's otherwise "doubtful" jurisdiction to deal with unfair methods of competition and unfair or deceptive acts and practices "which, although done in intrastate commerce, seriously affect honest competitors engaged in interstate commerce" (S. Rept. No. 46, 74th Cong., 1st Sess., p. 1). Senator Wheeler, who was in charge of the amendment, explained on the floor of the Senate that "This is simply a clarifying amendment. * * * the bill does not change the present law" (79 Cong. Rec. 1843). However, after the bill had been passed by unanimous consent, Senator Austin asked its reconsideration. His main complaint was that the amendment would authorize the Commission to regulate "production" and that a change of this character "should not be passed upon a mere calling of the calendar and the inattention of Senators like myself who did not comprehend the scope of the bill" but "ought to have full consideration" (79 Cong. Rec. 1843). Senator Borah was uncertain whether or not the Act defined "commerce" to mean interstate commerce; if not, "then this measure ought to be amended (79 Cong. Rec. 1844). Senator Wheeler then said (79 Cong. Rec. 1844):

> Mr. President, so long as there seems to be some misunderstanding, I will allow the vote to be reconsidered, and then we will let the measure go over for the day.

The bill was not again brought forward for action by the Senate.

Plainly enough, this legislative episode, in which only four Senators participated, is irrelevant to the issue here. None of the Senators taking part in the colloquy expressed the opinion that under the law as it then stood the Commission did not have authority to deal with unfair methods of competition which injuriously affected those selling in interstate commerce in competition with an intrastate seller. In addition, mere reconsideration of the vote on a bill which had been passed by unanimous consent on the calling of the calendar does not constitute decisive or affirmative action with respect to its merits.

7. Finally, it is true that a few somewhat comparable statutes use the more elaborate term "in or affecting" interstate commerce.[16] These statutes, however, were passed by different Congresses, under different circumstances, and fall considerably short of showing a precision of phraseology sufficient to warrant restriction of section 5 of the Trade Commission Act to a scope narrower than that necessary to accomplish its purposes. As was clearly pointed out in *United States* v. *Stewart*, No. 13, this Term, decided November 12, 1940, "No mere collation of other statutes can be decisive in determining what the instant statute means. The meaning of each phrase must be closely related to the time and circumstance of its use." Moreover, in none of these other statutes is the subject matter of

[16] National Labor Relations Act, secs. 2 (7), 9 (c), 10 (a), c. 372, 49 Stat. 450, 453 (29 U. S. C. Supp. V, secs. 152 (7), 159 (c), 160 (a)); Bituminous Coal Act, sec. 4, c. 127, 50 Stat. 76 (15 U. S. C. Supp. V, sec. 831); Civil Aeronautics Act, sec. 1, c. 601, 52 Stat. 977 (49 U. S. C. Supp. V, sec. 401).

regulation "unfair competition", where the victim may be engaged in interstate commerce while the culprit is not. An unfair labor practice, for example, would not necessarily be "in" interstate commerce because it affected that commerce. But, as we have shown, unfair competition by its nature is "in" interstate commerce whenever the injured competitor is engaged in interstate commerce.

CONCLUSION

It is respectfully submitted that the judgment of the court below should be reversed, with directions to affirm the order of the Federal Trade Commission.

FRANCIS BIDDLE,
Solicitor General.
THURMAN ARNOLD,
Assistant Attorney General.
HUGH B. COX,
CHARLES H. WESTON,
Special Assistants to the Attorney General.
W. T. KELLEY,
Chief Counsel,
Federal Trade Commission.

NOVEMBER, 1940.

U. S. GOVERNMENT PRINTING OFFICE: 1940

BLANK PAGE